



# The Uniformed Services Employment & Reemployment Act (USERRA)

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## **Overview**

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), prohibits discrimination against persons because of their service in the Armed Forces Reserve, the National Guard, or other uniformed services. USERRA prohibits an employer from denying any benefit of employment on the basis of an individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. USERRA also protects the right of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training.

## **Who is Protected by USERRA?**

USERRA defines "uniformed services" to include the following organizations:

- The Armed Forces (including the Coast Guard);
- The Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty;
- The commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.

Note: Performing National Guard duty in state rather than federal service is not covered by USERRA. However, most states have their own version of USERRA, which offers similar protection when called up, by the state.

## **Coverage Tests**

There are five general tests to establish coverage under USERRA.

- **Job:** All civilian jobs are covered, unless the employer can prove the job was truly a temporary position. USERRA applies to all private employers, state governments, and all branches of the federal government. Unlike some discrimination statutes, there is no "small business" exception.
- **Notice:** Military members or a responsible officer from their military unit must give advance notice to the employer before leaving for active duty. The notice may be

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either written or oral and is not required if military necessity prevents giving it or if it is otherwise impossible or unreasonable for the member to do so. To ensure protection, send the notice by certified mail or have the employer sign a copy acknowledging receipt.

- Duration: Generally, members can be gone from their civilian job for up to five years (total) with the same employer. Some categories of military service do not count, such as most periodic and special reserve and National Guard training, most service in time of war or emergency, and involuntary extensions on active duty.
- Character of Service: Veterans who have separated from the armed forces must have received an honorable or general discharge to be covered. In other words, veterans who received dishonorable discharges, bad conduct discharges, under other than honorable conditions discharges, and those who were dismissed or dropped from the rolls are not covered by USERRA protection.
- Prompt Return to Work: USERRA sets forth different time limits for returning to work depending upon the length of their absence due to military service:
  - *1 - 30 days of Service*: Must report to their employers by the beginning of the first regularly scheduled workday that occurs eight hours after the person returns home.
  - *31 - 180 days of Service*: Must submit an application for reemployment no later than 14 days after completion of their service.
  - *181 days + of Service*: Must submit an application no later than 90 days after completion of military service.

Note: These deadlines can be extended for up to two years for members who are hospitalized or convalescing because of a service-connected illness or injury.

### **Rights Under USERRA**

Veterans are entitled to certain protection both while in military service and when they return to their civilian position:

- Prompt Reinstatement. Veterans who were gone 30 days or less are entitled to their job back immediately. Those who were away longer must still be re-hired within a few days.
- Status and Seniority. In most cases, veterans must be promptly reemployed in the job that they would have had, had they remained continuously employed (the so-called "escalator principle"). Generally speaking, this means that if peers received promotions and/or raises while the member was gone, the member receives the promotion if he/she is qualified. If veterans can't become qualified for the position they would have had, employers may place them in their pre-service position, as long as they are qualified for the job or could become qualified. If the member cannot become qualified for the pre-service position, the employer must place the member in any other position of lesser status and pay that the member is qualified to perform, with full seniority. If the member has been gone for 91 days or more, the employer

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may offer the employee a position of equivalent seniority status and pay, in lieu of offering the "escalated" job the member would have had.

- Health Benefits. Veterans and their families have two types of health benefit rights:
  - *Health Insurance During Service*. If requested, employers must continue to carry veterans and their families on the company health plan for up to 30 days of service, at the normal cost. This can be important since TRICARE does not cover family members when the member's tour is for 30 days or less. Veterans can get up to 18 months of coverage, but the employer can pass on the full cost, including the employer's share, on to the member.
  - *Immediate Reinstatement of Health Benefits*. Veterans and their families may chose to go back on the company health plan immediately when they return to their civilian jobs. There can be no waiting period and no exclusion for pre-existing conditions, other than for VA-determined service-connected conditions.
- Pension Benefits. USERRA specifically guarantees those pension plan benefits that accrued during military service, regardless of whether a plan is a defined benefit plan or a defined contribution plan. Reemployed veterans are entitled to the following pension rights:
  - No break in employment service because of military service.
  - No forfeiture of benefits already accrued.
  - No need to requalify for participation in the pension plan because of military service absence.
  - Employers are required to make whatever contributions to returning veterans' pensions that the employer would have made if the employee had not been absent because of military service.
  - With respect to contributory plans that offer benefits only when an employee makes a contribution, veterans will have up to three times the period of service to make missed contributions, not to exceed five years.
- Accommodations for Disabilities Incurred in Military Service. Employers must provide reasonable accommodation for such disabilities, unless the employer can demonstrate undue hardship.
  - These requirements apply regardless of the size of the employer.
  - Veterans with service-connected disabilities who are not qualified for employment in the position that they would have "escalated" to, but for military service, or in the position that they left, must be reemployed promptly in any other position of similar seniority, status and pay for which the person is qualified or would become qualified with an employer's reasonable efforts.
  - If all else fails, reemployment must be in a position that is the nearest approximation consistent with the circumstances of the individual's case.
  - The disability does not have to be permanent to confer rights. For example, if the returning veteran broke a leg while on active duty, the employer is required to make reasonable efforts to accommodate this temporary disability.

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- Protection Against Discharge Without Cause. Reemployed veterans enjoy protection from discharge without cause for a period after returning to work, depending on the length of their absence.
  - If the member was gone for more than six months, the protection lasts for one year.
  - If the member was gone for 31 - 180 days, the protection lasts for six months.
  - If the member was gone for less than 30 days, there is no special protection.
 However, as explained below, the returning veteran cannot be removed for absence due to military duty.
- Protection Against Discrimination. USERRA prohibits employment discrimination based on past, present, or future military obligations. This prohibition extends to most employment-based decisions including hiring, retention, promotion, reemployment, termination and benefits.
  - There is no longer any distinction between active duty service and reserve or National Guard service. All types of veterans are protected.
  - Employers also may not take adverse employment action against a person because they assert their rights under USERRA, testify or assist in a USERRA investigation, or take enforcement action under USERRA.

### **Enforcing USERRA Rights**

Veterans have different methods of enforcing USERRA rights, depending on whether their employer is a federal agency, a state agency, or a private company and whether they wish to resolve things informally, through administrative channels, or through litigation.

- Military Legal Advice. Veterans who are still connected to the military, i.e., reserve and guard members and soon to be separated active duty members, can get legal advice from the nearest legal assistance office. This can be a good option in the early stages of a potential dispute. However, legal assistance officers cannot represent veterans in these disputes.
- National Committee for Employer Support of the Guard and Reserve (NCESGR). (1 (800) 336-4590). NCESGR is an agency within the Office of the Assistant Secretary of Defense for Reserve Affairs with the goal of improving relations between the guard and reserve and employers. They have volunteer ombudsmen who attempt to resolve disputes between veterans and employers.
- Complaint with Veterans' Employment and Training Service (VETS). The agency of the U.S. Department of Labor (DOL) is charged with investigating allegations of USERRA violations.

Civil Litigation. Veterans can take an employer directly to court if they choose not to file a claim with VETS.

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## **Filing a USERRA Complaint with OSC**

If you are a federal employee or applicant for federal employment and believe that a federal agency has violated your USERRA rights, you may file a USERRA claim with U.S. Office of Special Counsel (OSC) if:

1. Your social security number ends in an odd numbered digit (i.e., ends in 1, 3, 5, 7, or 9) or
2. Regardless of your social security number, if you also allege that the involved federal agency has engaged in a prohibited personnel practice. (Click on “Prohibited Personnel Practices” heading for more information on what constitutes a prohibited personnel practice.)

If you are not alleging a prohibited personnel practice and your social security number ends in an even numbered digit (i.e., 0, 2, 4, 6, 8), and you do not fall into category 2 above, OSC is not authorized to receive directly your USERRA complaint. Instead, you should first file your complaint with VETS. If VETS is unsuccessful in resolving the complaint, you may request that VETS refer the complaint to OSC. If the Special Counsel believes there is merit to the complaint, OSC will initiate an action before the Merit Systems Protection Board and appear on your behalf. The successful claimant is entitled to receive the employment benefits that he/she was denied as the result of the agency's violation of USERRA. Additionally, a prevailing claimant is entitled to attorney's fees, expert witness fees, and other litigation expenses.

*Please use Form OSC-14 to submit a USERRA complaint to OSC. Electronic filing of a USERRA complaint is not currently available.*

## **How Does the Enforcement Process Work?**

The Veterans' Employment and Training Service (VETS) will conduct a thorough investigation of the complaint. If violations are confirmed, VETS will attempt to resolve the matter. If the matter cannot be resolved, the next step depends on the type of employer involved.

- Employer is a federal executive agency:
  - Request that DOL refer the case to the Office of Special Counsel (OSC). If OSC agrees there is a violation, federal employees can request that OSC represent them and take the case to the Merit Systems Protection Board (MSPB).
  - Hire their own attorneys to represent them in front of the MSPB.
- Employer is a private employer:
  - Request that DOL refer the case to the Department of Justice (DOJ).
  - Request that DOJ represent them in federal district court.
  - Hire their own attorneys to represent them in federal district court.

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- Employer is a state government agency. Request DOL refer the case to DOJ or hire attorneys to represent them. According to the statute, if DOJ decides to represent the veteran, the case is brought in the name of the federal government instead of the employee in federal district court, while if the veteran uses a private attorney; the suit is brought in state court.

### **What Remedies Are Available?**

Veterans can:

- Be returned to a job;
- Receive back pay;
- Receive lost benefits;
- Have personnel files corrected;
- Receive lost promotional opportunities;
- Receive retroactive seniority;
- Have pensions adjusted;
- Have vacation time restored.

In addition, if the veteran hired a private attorney, the court can award attorney fees and other costs of litigation. If the court finds that the violation of the law was willful, the court may double the amount of back pay or lost benefits.

Reference(s):

- Act: 38 U.S.C. § 4301
- U.S. Department of Labor: <http://www.dol.gov/compliance/laws/comp-userra.htm>
- U.S. Office of Special Counsel: <http://www.osc.gov/userra.htm>

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